
(2015) 10 BOM CK 0086
In the Bombay High Court
Case No : Writ Petition No. 1108 of 2012

WIKA Instruments India Pvt. Ltd.

APPELLANT

Vs

Swati U. Nowgaonkar

RESPONDENT

Date of Decision : 01-10-2015

Acts Referred:

Constitution of India, 1950 — Article 309
Contract Act, 1872 — Section 23
Industrial Disputes Act, 1947 — Section 10, 10(1)(c), 13, 13(2), 15
Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 — Section 28

Citation : (2016) LLR 209 : (2015) 6 MhLj 768

Hon'ble Judges : N.M. Jamdar, J.

Bench : Single Bench

Advocate : N.R. Patankar, V.P. Sawant and Prabhakar Jadhav, for the Appellant;
Nitin Kulkarni and Avinash Belge, for the Respondent

Final Decision : Dismissed

Judgement

N.M. Jamdar, J.—By this writ petition, the Petitioner, WIKI Instruments Private Limited, challenges the judgment and award dated 14 November 2011, passed by the Labour Court, allowing the reference and holding that the termination of the Respondent effected on 17 April 2008 is illegal and that the Respondent is entitled to reinstatement with continuity of service and full back wages with effect from 17 April 2008.

2. The Petitioner is a Company registered under the Companies Act. The Respondent was appointed as a Receptionist-cum- Telephone Operator by an appointment letter dated 21 May 2007, with effect from 19 June 2007, on probation for a period of six months. She was working at the factory-cum-office of the Petitioner at Pune. The appointment letter stated that the probation period may be extended at the Company's discretion. During the probation period, her services were terminable by either side with 24 hours notice. It was stated that unless the Respondent was confirmed by order in writing at the end of

probationary period, her services with the Company will automatically stand terminated. Her basic salary was fixed at Rs. 5000/- per month. She was eligible for H.R.A. of Rs. 3000/- per month and a conveyance allowance of Rs. 2000/- per month. Her job was stated as terminable, working hours were specified and detailed terms and conditions of the employment were set out. The age of retirement was specified as 58 years. The appointment order was to be construed and interpreted in accordance with laws of India.

3. The period of six months ended on 19 December 2007. Thereafter there no letter of continuation or termination of service was issued to the Respondent. The Respondent continued to work as Receptionist-cum-Telephone Operator. On 17 April 2008, her services were terminated. The letter of termination stated that, during the period of probation her performance was not to the satisfaction of the Petitioner, she did not improve her performance till the date, and as per Clause 1.3 of the letter of appointment her services stood terminated with effect from 17 April 2008. She was offered one month's salary in lieu of notice and a cheque of Rs. 22,728/- towards full and final settlement of her dues was enclosed.

4. The Respondent thereafter raised a dispute before the Conciliation Officer. The Conciliation Officer admitted the dispute in conciliation on 28 July 2008 and commenced conciliation proceedings. He submitted a failure report on 12 August 2008 as the conciliation proceedings failed to arrive at a settlement. Thereafter the Commissioner of Labour, by order dated 14 August 2009 made a reference under Section 10(1)(c) of the Industrial Disputes Act, 1947. In the schedule annexed to the Reference, three points were referred for consideration of the Presiding officer of the Second Labour Court, Pune.

5. Pursuant to the Reference, the Respondent submitted her Statement of Claim. In the statement, the Respondent contended that the Petitioner employed more than 100 employees and, therefore, Model Standing Orders framed under the Industrial Employment (Standing Orders) Act, 1946 were applicable to the Petitioner and the Petitioner did not have Service Rules of its own. The Standing Orders provided for probationary period of three months. According to the Respondent, after the completion of three months, as specified in the Standing Orders, she was deemed permanent, and her simplicitor termination on 17 April 2008 was bad in law. She also contended that, she had completed 240 days of continuous service and, therefore, her services could not have been terminated without complying with the provisions of Section 25F of the Industrial Disputes Act. It was also contended that no seniority list as required under Rule 81 of the Industrial Disputes (Bombay) Rules of 1957 was ever displayed on the notice board prior to her termination. It was asserted by the Respondent that she is a "workman" under Section 2(s) of the Industrial Disputes Act. After her termination, she tried to secure a job, but she was unemployed. She sought reinstatement with continuity of service and full back wages.

6. The Petitioner filed its written statement. The Petitioner contended that the Respondent was appointed on probation. The probationary period continued till

17 April 2008, when on account of her unsatisfactory performance, objectionable behaviour, manners and attitude and lack of punctuality, her services were terminated. After the initial period of six months, she was never made permanent by order in writing till her termination on 17 April 2008. The Respondent continued on probation and there was no such concept or provision for deemed permanency or confirmation. It was also contended that the Respondent had not completed more than 240 days of continuous service. It was denied that the termination was in violation of Section 25F of the Act and the termination amounted to retrenchment under Section 2(oo) of the Act. It was again reiterated that since her work was not satisfactory in terms of the contract i.e. the appointment letter, her services were terminated. The Petitioner placed on record certain instances of conduct and behaviour of the Respondent which according to the Petitioner merited the termination of Respondent's services.

7. The Respondent examined herself on oath and she was cross-examined. On behalf of the Petitioner, the Director of the Petitioner Company Mr. Bhattacharya was examined and he was also cross-examined. The Labour Court considered the evidence on record and the argument advanced by both sides. The Labour Court held that the termination of the Respondent with effect from 17 April 2008 is illegal and void ab initio. The termination was contrary to Clause 4-A of the Industrial Employment Standing Orders. As per Clause 4-A, the Respondent had become permanent after the expiry of period of three months and her termination was bad in law. The Labour Court also did not find merit in the contention of the Petitioner that the work of the Respondent was not satisfactory. The Labour Court held that the termination being bad in law, the Respondent is entitled to reinstatement with full back wages. The contention of the Petitioner that even assuming the termination is bad in law, the reinstatement with back wages need not be granted considering the facts and circumstances and at the most compensation be granted, was rejected. Accordingly, the Labour Court passed the impugned Award on 15 November 2011.

8. The Petitioner thereafter filed the present petition which came up on board for admission on 20 March 2012 and Rule was issued on that date. The Rule was issued only on the issue of back wages. The Petitioner challenged the order dated 20 March 2012 by way of Letters Patent Appeal. By order dated 17 April 2012, the issue of interim relief was directed to be decided afresh. Thereafter the matter was placed before the learned Single Judge again and by order dated 9 May 2012 the Rule was issued on the issue of reinstatement as well as back wages and the impugned award was stayed.

9. The Respondent took out an application for payment of last drawn wages as per Section 17-B of the Industrial Disputes Act. Application was disposed of directing that the Petitioner will pay an amount of Rs. 7500/- to the Respondent instead of Rs. 10,000/-, which according to the Respondent was the last drawn wages. The Respondent filed a Special Leave Petition in which leave was granted and by order dated 5 January 2015 the Apex Court disposed of the Civil Appeal

No. 62 of 2015 directing the Petitioner to pay wages at the rate of Rs. 10,000/- to the Respondent and requested the High Court to dispose of the writ petition expeditiously. The petition is, therefore, taken up for hearing on priority basis.

10. I have heard Ms.N.R. Patankar, learned counsel for the Petitioner and Mr. Nitin Kulkarni, learned counsel for the Respondent.

11. First the issue of the status of the Respondent on the date of termination. According to the Petitioner, the Respondent continued to be a probationer on the date she was terminated. While it is the case of the Respondent that the Respondent had become permanent in view of Clause 4-A of the Model Standing Orders. The Labour Court has upheld the contention of the Respondent. The main argument raised by Ms.Patankar is that, the Respondent could have been confirmed in service only by issuing a specific letter to that effect and since no letter was issued the Respondent continued to be under probation. She also submitted that, in view of Clause 30 of the Industrial Employment Standing Orders, the appointment letter, which a contract of service, supersedes what is contained in Clause 4-A of the Standing Orders.

12. Before proceeding further with the discussion, the provisions of Industrial Employment Standing Orders Act need to be considered. It is not disputed that the Industrial Employment Standing Orders Act is applicable to the Petitioner establishment, and that the Respondent is covered by it. The Industrial Employment Standing Orders (the Standings Orders) lay down a methodology in respect of certain conditions of service of employment in an industrial establishment. The Standing Orders have been framed to define certain conditions of employment in industrial establishment with sufficient precision. Section 2(a) makes the Model Standing Orders, as defined under Section 15 of the Act applicable to every industrial establishment which fulfill the conditions laid down therein. Section 3 requires the employer or any workman employed therein to submit amendments to the Model Standing Orders. Section 5 deals with certification of amendments. It provides that on receipt of draft under section 3 , the Certifying Officer will forward copy to the Trade Union or workman in the prescribed manner and after giving an opportunity to the employer and to the Trade Union or such representative of workmen, decide whether any modification to the Model Standing Order is necessary. Thereupon the Certifying Officer will make an order amending the Model Standing Orders. Section 6 provides for an appeal from the modification carried out by the Certifying Officer under Section 5 of the Act. Section 10 deals with duration of modification of Standing Orders. Section 12-A deals with temporary application of Model Standing Orders. Section 13 lays down the penalty and procedure for violation of the Standing Orders. Section 15 empowers the appropriate Government to make Rules. Section 15(1-B) empowers the appropriate Government to set out Model Standing Orders.

13. In exercise of Section 15 of the Standing Orders Act of 1956, the Maharashtra Industrial Employment Standing Orders Rules 1959 have been

enacted. Schedule 1-B of the Model Standing Orders apply to all workmen employed in the establishment to do clerical or supervisory work. It is not disputed before me that the Respondent is workman and that she was employed to do clerical and supervisory work. Therefore Model Standing Orders in Schedule B will apply to the Respondent. Clause 4-A to 4-D contained in Schedule-B were brought in by way of an amendment with effect from 2 January 1978.

14. The first challenge is that there was no specific order of continuation of service and, therefore, the Respondent was on probation when she was terminated. That the Respondent completed period of three months of uninterrupted service is not in dispute. Subject of probation is dealt with in the Clause 4-A of Schedule B. Clause 4-A reads as under :

"4-A. Every probationer who has completed the period of three months uninterrupted service in the post in which he is provisionally employed shall be made permanent in that post by the Manager by an order in writing, within seven days from the date of completion of such service:

Provided that where certified standing orders prevailing on the date of coming into force of this rule prescribe a longer probationary period than three months, the probationer shall complete such probationary period.

Provided further that, if the service of the probationer are found to be unsatisfactory, the Manager may terminate his services after his probationary period.

Explanation.- For the purpose of this clause, the probationary period shall not include any interrupted service and shall not be deemed to have been broken by such interrupted service."

Clause 4-A mandates an employer to pass an order in writing within a period of seven days of completion of the probationary period. The employer can discontinue the services of the probationer after this period if the services are not satisfactory. At the end of seven days, after the period of completion of three months, the employer has to issue an order in writing making the probationer permanent or discontinue the services. There is no third option to the employer under clause 4-A. The employer cannot take a stand that he will neither issue an order of making an employee permanent nor discontinue the services, within a period of seven days. The employer has to take a decision either way. It cannot defer this decision. Even if he does defer the issue, by operation of Clause 4-A the workman will be deemed permanent. Therefore, the argument that because the Petitioner did not issue a letter making the Respondent permanent, the Respondent continued on probation cannot be accepted in view of the clear language of Clause 4-A. Clause 4-A postulates that if the services are not dispensed with, the services are made permanent. This continuation is not dependent on the decision of the employer but by operation of law. Standing Order 4-A is applicable to the Respondent, therefore the Respondent will be entitled to by virtue of the operation of this clause to be made permanent after

having completed period of three months of uninterrupted service.

15. Ms.Patankar contended that, by virtue of Clause 30 of the Standing Orders, the appointment letter i.e. contract of service will supersede the provision of Clause 4-A. Though this is the main argument of Ms.Patankar it was never taken in this form before the Labour Court. The Labour Court therefore did not have any occasion to deal with the interplay between Clause 30 and Clause 4A of the Standing Orders. However, I have permitted the Petitioner to advance this argument even though in a given case it could not have been so permitted. Mr. Kulkarni has also responded to the same.

16. Clause 30 reads as under :

"Clause 30. Nothing contained in these Standing Orders shall operate in derogation of any law for the time being in force or to the prejudice of any right under a contract of service, custom or usage or an agreement, settlement or award applicable to the establishment."

17. The contract of service in the present case is the appointment letter dated 21 May 2007. The relevant provisions in the appointment letter read as under :-

"1. Appointment:

1.1 You have been appointed as "Officer-Receptionist-cum- Telephone Operator" Pune Office.

1.2 You have joined on 19th June 2007.

1.3 You will be on probation for a period of six months from the date of your joining. This period may be extended at the Company's discretion. During the probationary period this arrangement would be terminable by either side with 24 hours notice and without assigning any reason. Unless you are confirmed in writing at the end of the probationary period or communicated about any extension thereof, your services with the Company will automatically stand terminated.

1.4 After confirmation the appointment is terminable by either side, without assigning any reason, by one month's notice in writing or by payment equivalent to one month's salary to the other side, in lieu of notice."

The appointment letter states that the probationary period will be of six months. It will be extended at Petitioner's discretion and unless the Respondent is confirmed the service will stand automatically terminated. Therefore, what the appointment letter contemplates is a probation period of six months, issuance of a letter of confirmation and that unless confirmed, the service would stand automatically terminated. Relying on this letter, Ms.Patankar contended that till the letter of confirmation is issued, even if the Respondent continued beyond the period of probation, she will have to be treated on probationary. She submitted that there is no such concept of deemed permanency. For that purpose, Ms.Patankar, placed strong reliance on the decision of the Apex Court in the case

of State of Punjab Vs. Dharam Singh, . Relying upon this decision, she submitted that merely because an employee is allowed to continue on the post after the period of probation without any specific order of confirmation, she cannot be deemed to be made permanent in absence of any provision to the contrary in the original order of appointment or service rules. The reliance on this decision is misplaced. The decision of Dharam Singh (supra) arose from statutory rules framed by the Government of Punjab in exercise of powers conferred by the Proviso to Article 309 of the Constitution. The case that came before the Apex Court was thus under service law. It is settled that all principles applicable in service law cannot be ipso facto made applicable to the labour laws, as they operate in different fields.

18. The very issue, the right of an employee under Clause 4-A to get confirmed after the end of the probationary period came up for consideration before the learned Single Judge (H.D. Patel, J.) of this Court in Indian Tobacco Co. Ltd., Nagpur Vs. Industrial Court, Nagpur and Another, . The case of Indian Tobacco (supra) closest on facts to the controversy at hand. The workman therein was appointed as a probationer as a Sales Representative. He was appointed on probation for a period of 12 months and for such extended period as may be determined by the management. The workman accepted the offer and signed the contract of probationer employment. Thereafter the services of the workman were terminated on the ground that his services were not satisfactory. The workman filed the complaint before the Labour Court under Section 28 of the M.R.T.U. & P.U.L.P. Act, 1971, alleging unfair labour practices. It was contended by the workman that there were no Certified Standing Orders and the Model Standing Orders laid down that probation period can only be of three months and not more and therefore he deemed to have been completed three months period and his termination was illegal. The Labour Court found that the workman had completed the probationary period and had become regular employee and termination of the workman was illegal. The employer thereafter filed a writ petition before the Nagpur Bench of this Court. It was contended relying on the decision of State of Punjab v/s Darshan Singh 1968 (17) FLR 9 and other decisions of the Apex Court that the probationer cannot, after expiry of probation period, automatically acquire the status of permanent employee in service. Patel, J. distinguished the decisions on the ground that they arose from service jurisprudence and did not have an occasion to consider a specific provision like Clause 4-A. Patel, J. held that in view of Clause 4-A, the employee is deemed to have become confirmed. After rendering this finding, Patel, J. also referred to the decision of the Apex Court in Western India Match Company Ltd. Vs. Workmen, ., Patel, J. held that, even if there exist a contract of service, the Model Standing Orders and Standing Orders will prevail over the contract of employment. Patel, J. considered the argument based on Standing Order No. 32 which is akin to Standing Order No. 30 relied upon by Ms.Patankar. Patel, J. observed that prohibition under Standing Order 32 is cast against the operation of Standing Order only when better right acquired by an employee under the

contract of service is likely to be prejudiced. Accordingly, Patel, J. after holding that the workman after completion of the period specified in the Standing Orders had seized to be as probationer and held that the action taken by the employer, after the workman had acquired the status of a permanent workman, would be a punitive action.

19. Ms. Patankar, submitted that, the decision in Indian Tobacco was followed by another learned Single Judge (B.P. Dharmadhikari, J.) in the case of Raymond UCO Denim Private Ltd., (Formally known as Raymond Ltd. (Denim Division)) Vs. Praful Warade and Others, , and this decision was challenged by a Letters Patent Appeal and the order is stayed. Nothing has been placed on record that the declaration of law laid down by the learned Single Judge in the case of Raymond U.C.O. (supra) following the decision in Indian Tobacco Company Ltd. (supra), is suspended.

20. Ms. Patankar then submitted that the foundation of the Indian Tobacco Co. Ltd. (supra) on the interpretation of Clause 32 is the decision of the Apex Court in Western India Match Co. Ltd. (supra), which reliance is incorrect and the decision of the Apex Court arose in completely different context. She submitted that the observation of Patel, J. that prohibition under Standing Order 32 (30) is against only when better rights are acquired by the employee is not borne by the Standing Orders interpreted by the Apex Court. Ms. Patankar placed on record the provisions of U.P. Industrial Employment Model Standing Orders, 1991 which were issued with effect from 24 July 1992 and submitted that though the exact text of the Model Standing Order interpreted by the Apex Court is not available at present, but the Clause 32 therein is the same which arose for consideration before the Apex Court. She submitted that Clause 32, which is a saving clause, lays down that nothing in the Standing Order shall have an effect of taking away from a workman any right, benefit or privilege to which he might otherwise be entitled to under any law, rules or regulations for the time being in force in an industrial establishment. She submitted that the U.P. Industrial Employment Model Standing Orders, therefore, in clear terms gave a right in favour of the workman in contrast with the Maharashtra Standing Orders which do not contain such a provision. She submitted that whether the Standing Orders would override the contract or agreement has been decided by at least two division benches of this Court i.e. in the case of Pune Municipal Corporation v/s D.P. Gokhale 2006 (2) CLR 105; Balmer Lawrie Co. v/s Workers 2011 (2) CLR 787 and also by learned Single Judge in the case of Shri Tulsiram K. Gothad Vs. The Superintendent, Mahatma Gandhi Memorial Hospital and Another, .

21. Firstly, it is not possible to read the decision of the Apex Court in Western India Match Co. Ltd. (supra) in such a narrow ambit. The Apex Court did not restrict itself on the interpretation of Standing Orders alone. The Apex Court discussed the underlying philosophy behind the need to bring certainty in respect of services of a probationer. In the case of Western India Match Co. Ltd. (supra), the workman was appointed on probation for six months. Thereafter, the

employer passed an order extending the period of his probation by two months. Thereafter the employer discharged the workman as his services were no longer required. An industrial dispute arose which was adjudicated by the Labour Court. It was contended that, after the expiry of two months, the workman automatically became permanent. The Labour Court took a view that the term specifying probation period of six months was in contravention of the Standing Orders. The Apex Court then took review of the decisions, more particularly, the case of Salem Erode Electricity Distribution Company Ltd. Vs. Salem Erode Electricity Distribution Co. Ltd. Employees Union, , and held that once the Standing Orders have been made applicable, it is not permissible to have different sets of contracts of appointments and the Standing Orders will have to be uniformly applied to all workmen alike. The Apex Court thereafter observed thus :

"8. In the sunny days of the market economy theory people since rely believed that the economic law of demand and supply in the labour market would settle a mutually beneficial bargain between the employer and the workman, Such a bargain, they took it for granted, would secure fair terms and conditions of employment to the workman. This law they venerated as natural law. They had an abiding faith in the unity of this law. But the experience of the working of this law over a long period has belied their faith. Later generations discovered that the workman did not possess adequate bargaining strength to secure fair terms and conditions of service. When the workmen also made this discovery, they organised themselves in trade unions and insisted on collective bargaining with the employer. The advent of trade unions and collective bargaining created new problems of maintaining industrial peace and production for the society. It was therefore considered that the society as also an interest in the settlement of the terms of employment of industrial labour. While formerly there were two parties at the negotiating table the employer and the workman, it is now thought that there should also be present a third-party, the State, as representing the interest of the society. The Act gives effect to this new thinking. By Section 4 the Officer certifying the Standing Order is directed to adjudicate upon "the fairness or reasonableness" of the provisions of the Standing Order. The Certifying Officer is the statutory representative of the Society. It seems to us that while adjudging the fairness or reasonableness of any Standing Order? The Certifying Officer should consider and weigh the Social interest in the claims of the employer and the social interest in the demands of the workman. Section 10 provides the mode of modifying the Standing Orders. The employer or the workman may apply to the Certifying Officer in the prescribed manner for the modification of the Standing Orders. Section 13(2) provides that an employer who does any act in contravention of the Standing Order shall be punishable with fine which may extend to one hundred rupees. It also provides for the imposition of a further fine in the case of a continuing offence. The fine may extend to twenty-five rupees for every day after the first during which the offence continues.

9. The special agreement, in so far as it provides for additional four months of

probation, is an act in contravention of the Standing Order. We have already held that. It plainly follows from Section 4 , 10 and 13(2) that the inconsistent part of the special agreement cannot prevail over the Standing Order. As long as the Standing Order is in force, it is binding on the Company as well as the workmen. To uphold, the special agreement would mean giving a go-by to the Act's principle of three-party participation in the settlement of terms of employment. So we are of opinion that the inconsistent part of the special agreement is ineffective and unenforceable."

(emphasis supplied).

22. The Standing Orders have been framed in the larger interest of the society. Society has interest in maintaining peace in industrial relations. Certainty aids in bringing peace in the industrial relations. Trade unions were formed since the workmen found that they had unequal bargaining power. It is to bring equality in this unequal relations that the State has stepped in and has formulated the Standing Orders. The above observations of the Apex Court, go beyond the language of a particular standing orders and expounds a larger principle. The contention of Ms.Patankar that because the language of the clause from which the case arose before the Apex Court is different, the decision need not be taken into consideration, therefore, cannot be accepted on that ground alone.

23. Now turning to the decisions of the Division Bench and the learned Single Judge relied upon by Ms.Patankar. In the case of Gothad (supra), the learned Single Judge (R.J. Kochar, J.) considered the provision of Clause 27 (25 in the present case) regarding the age of retirement. In that context of Clause 27, Kochar, J. considered the general clause and held that it will override what is stated in the Standing Orders. Clause 25 reads as under :

"Clause 25. The age for retirement or superannuation of the workmen may be sixty years or such other age as may be agreed upon between the employer and the workmen by an agreement, settlement or award, which may be binding on the employer and the workmen under any law for the time being in force."

(emphasis supplied)

Clause 25 states that the age of retirement or superannuation of a workman may be 60 years but this age can be varied by an agreement, settlement or award. On the face of it this clause is different than Clause 4-A. The case of Gothad (supra) therefore turned on language of Clause 25 itself. Once Kochar, J. came to the conclusion that the case would be decided on the basis of Clause 27 (25 in the present case) itself, it was not necessary to rely upon Clause 32. The case of Gothad was thereafter considered in appeal by the Division Bench in the decision reported in (2007) 3 CLR 718. The Division Bench noted that in the facts of the case it is not necessary to construe the provisions of the Clause 32. The Division Bench observed thus -

"4. So far as the Model Standing Order No. 32 is concerned, it is not necessary

for us to consider that provision, because in view of the provisions of Model Standing Order No. 27 the position is clear that the age of retirement mentioned in that provision will apply only if there is no other age of retirement mentioned in the agreement between the parties. Perusal of the judgment of the learned Single Judge in the case of "Engineering Workers" Association v. J.D. Jamdar, Member, Industrial Court & ors." shows that the learned Single Judge has, in support of the view that she has taken, relied on the judgment of the learned Single Judge in the case "The Indian Tobacco Company Ltd. v. The Industrial Court & ors.". Perusal of that judgment shows that the learned Single Judge in that case was considering the provisions of Model Standing Order No. 4-A and not Model Standing Order No. 27. In our opinion, this case turns on the language employed in the Model Standing Order No. 27, and therefore, the judgment of the learned Single Judge in the case "The Indian Tobacco Company Ltd. v. The Industrial Court & ors." as also the judgment of the Supreme Court in the case between " Western India Match Company Ltd. Vs. Workmen, " are not relevant. We may mention here that in so far as the Model Standing Order No. 32 is concerned, our attention was invited by the learned counsel appearing for Respondent No. 1 to the judgment of the Division Bench in the case " Pune Municipal Corporation and Others Vs. Dhananjay Prabhakar Gokhale, " referred to above, where construction different from the one placed by the learned Single Judge in the case "The Indian Tobacco Company Ltd. v. The Industrial Court & ors." on Model Standing Order No. 32 has been accepted by the Division Bench. However, as observed above, in view of the clear language employed by the Model Standing Order No. 27, it is not necessary for us to consider Model Standing Order No. 32."

5. It was contended, as observed above, on behalf of the appellant that the contract of employment between the appellant and the respondent No. 1 which prescribed the age of retirement as 58 years for Class III employees is void because it is contrary to the provisions of Section 23 of the Indian Contract Act and reliance is placed on the judgment "Central Inland Water Transport Corporation Ltd. & anr. v. Brojo Nath Ganguli & anr., 1986 II CLR 322". In our opinion, the submission is devoid of any merit. Prescribing age of retirement as 58 years for a class of employees can by no stretch of imagination be said to be opposed to any public policy. In any case, the Model Standing Order No. 27 which according to the appellant is law on the point itself allow a different age of retirement being agreed upon between the parties. In our opinion, therefore, the submission has no substance."

(emphasis supplied)

The Division Bench clearly emphasized that the decision in the case of Indian Tobacco and of the Apex Court in the case of Western India Match Co. were not relevant when the interpretation of Clause 27 was in question. The Division Bench observed that Clause 27 itself had a different language and it is not comparable to Model Standing Order 4-A which was considered in the case of

Indian Tobacco. Therefore, the case of Tulsiram Gothad (supra) both the learned Single Judge and Division Bench is of no assistance for the Petitioner.

24. As far as the decision in the case of Boman Lawrie is concerned, this decision also is of no avail to the Petitioner. In this decision, the issue that arose for consideration was the age of retirement as per the Model Standing Order Nos. 27 and 32, the Division Bench followed the decision in the case of Tulsiram Gothad. However, as stated earlier, Clause 27 operates in completely different field and employs a different language and permits change in the age of retirement not by Certified Standing Orders but by an agreement.

25. Ms. Patankar then placed heavy reliance on the decision of the Division Bench in the case of Pune Municipal Corporation and Others Vs. Dhananjay Prabhakar Gokhale, . She submitted that the Division Bench has clearly observed that in view of Clause 32, the settlement/agreement arrived at between the parties will not override what is stated in Clause 4-C by virtue of Clause 32 of the Model Standing Orders. Mr. Kulkarni submitted that this ratio will have to be seen in the light of the facts of the case. According to him, the primary finding of the Division Bench that an employee will not be entitled to permanency by merely completing 240 days in a year and thereafter holding that there were no vacancies to grant permanency. He submitted that the observations of the Division bench in respect of the settlement overriding the provisions of the Standing Orders would therefore will have to be treated as a obiter as it was not necessary to decide the same as the case could be decided on the first point alone.

26. In Pune Municipal Corporation (supra), the Division Bench noted that even though the Model Standing Order Clause 4-C grants permanency after completion of 240 days, Clause 4-C could not be read disjunctively and ignoring the settled law repeatedly reiterated by the Apex Court. The Division Bench held that once it is a settled principle that in absence of availability of permanent post approved by competent authority, mere completion of 240 days in service would not entitle workman to benefit of Clause 4-C of Model Standing Orders. In addition, the Court also noted that the Union had entered into a settlement with the Corporation regulating the claim of permanency and has argued that it will be claimed after a period of five years. Those employees who had completed five years were granted permanency as and when permanent vacant post duly approved became available. The Division Bench proceeded to quote Clause 32 and observed that since it was not in dispute that employees are agreed that the claim of permanency would be available on completion of five years and upon availability of permanent vacant post, no claim of Clause 4-C ignoring settlement could be entertained.

27. There is merit in the contention of Mr. Kulkarni that the case before the Division Bench was on different facts. Even otherwise, the observations of the Division Bench in the context of Clause 4-C (4-B in the present case) cannot ipso facto be made applicable to Clause 4-A which is at hand. Clause 4-B of the Model

Standings in question is similar to Clause 4-C which was under consideration of the Division Bench. Both Clauses 4-A and 4-B are reproduced for ready reference as under :

"4-A. Every probationer who has completed the period of three months uninterrupted service in the post in which he is provisionally employed shall be made permanent in that post by the Manager by an order in writing, within seven days from the date of completion of such service:

Provided that where certified standing orders prevailing on the date of coming into force of this rule prescribe a longer probationary period than three months, the probationer shall complete such probationary period.

Provided further that, if the service of the probationer are found to be unsatisfactory, the Manager may terminate his services after his probationary period.

Explanation.- For the purpose of this clause, the probationary period shall not include any interrupted service and shall not be deemed to have been broken by such interrupted service.

4-B. A temporary workman, who has put in 190 days" uninterrupted service in the aggregate in any establishment of a seasonal nature or 240 days" uninterrupted service in the aggregate in any other establishment, during a period of preceding twelve calendar months, shall be made permanent in that establishment by an order in writing signed by the Manager, or any person authorized in that behalf by the Manager, irrespective of whether or not his name is on the muster roll of the establishment throughout the period of the said twelve calendar months.

Explanation.- For purpose of this clause any period of interrupted service, caused by cessation of work which is not due to any fault of the workman concerned, shall not be counted for the purpose of computing 190 days or 240 days or as the case may be, for making a badli or temporary workman permanent."

Clause 4-B lays down that a temporary workman who has put in 190 days or 240 days as the case may be, shall be made permanent. There is no other rider or proviso to Clause 4-B. Clause 4-A, however, is completely distinct in language. The first part of 4-A lays down that, every probationer who has completed the period of three months shall be made permanent within seven days of completion of service. Second proviso lays down that if the services are found to be unsatisfactory, the manager may terminate his services after his probationary period. The term "after his probationary period" in the second proviso, has been interpreted to mean within a period of seven days as contemplated in the first part of Clause 4-A. The first provision indicates that a longer period may be provided in the Certified Statutory Orders. Ms. Patankar has not been able to show that Clauses 4-B to 4-D contain any such similar provision. Therefore, Clause 4-A will have to be read differently than Clause 4-B, which fell for

consideration of the Division Bench. Hence, the Petitioner cannot rely upon this decision.

28. Section 5 of the Standing Orders Act lays down the methodology for amendment of the Standing Orders. Section 5 reads as under :

"Sec.5. Certification of (amendment).- (1) On receipt of the draft under Section 3 , the Certifying Officer shall forward a copy thereof to the trade union, if any, of the workmen, or where there is no such trade union, to the workmen in such manner as may be prescribed or the employer, as the case may be, together with a notice in the prescribed form requiring objections, if any, which the workmen, or employer may desire to make to the draft amendments to be submitted to him within fifteen days from the receipt of the notice.

(2) After giving the employer, the workmen submitting the amendment and the trade union or such other representatives of the workmen as may be prescribed an opportunity of being heard the Certifying Officer shall decide whether or not any modification of the draft submitted under sub-section (1) of Section 3 is necessary, and shall make an order in writing accordingly.

(3) The Certifying Officer shall thereupon certify the draft amendments after making any modifications therein which his order under sub-section (2) may require, and shall within seven days thereafter send copies of the model standing orders together with copies of the certified amendments thereof, authenticated in the prescribed manner and of his order under sub-section (2) to the employer and to the trade union or other prescribed representatives of the workmen."

Section 6 provides an appeal against the order passed under Section 5 . Section 6 reads as under :

"Sec.6 : Appeals.-(1) Any employer, workman, trade union or other prescribed representatives of the workmen aggrieved by the order of the Certifying Officer under sub-section (2) of Section 5 may, within thirty days from the date on which copies are sent under sub-section (3) of that section, appeal to the appellate authority, and the appellate authority, whose decision, shall be final, shall by order in writing confirm the amendments either in the form certified by the Certifying Officer or after further modifying the same as the appellate authority thinks necessary.

(2) The appellate authority shall, within seven days of its order under sub-section (1), send copies thereof to the Certifying Officer, to the employer and to the trade union or other prescribed representatives of the workmen accompanied unless it has confirmed without further modifications the amendments as certified by the Certifying Officer by copies of the model standing orders together with the amendments as certified by it and authenticated in the prescribed manner."

As far as the period of probation is concerned, Clause 4-A lays down a period of three months. This period can be extended by following the methodology laid

down under Section 5 .

29. The Standing Orders fix the period of probation. It can be varied upon by order of the Certifying Officer after hearing both sides. Thus, the period of probation can be changed on the intervention of the State machinery provided under the Standing Orders. The Apex Court, in *Western Match Co.* has underlined the basic concept behind the State intervention in the matters of probationary periods and has emphasized the danger of leaving everything to the free market forces keeping in mind the unequal bargaining position.

30. Clause 4-A has been brought in by amendment with effect from 2 January 1978. Clause 30 which is a general provision continues to be on the statute books since the year 1959. Clause 4-A not only lays down a fixed probationary period but also indicates the circumstance in which the period can be different. Clause 4-A fixes a period and also provides what can be the exception. This clause is thus a code by itself. This special provision then cannot be overridden by the contract of service as provided in Clause 30, which is a general clause. It however needs to be made clear that Clause 30 refers to various categories, that is contract of service, custom, usage, agreement, settlement and award. I do not wish to comment as to whether the other categories mentioned in Clause 30 i.e. custom, usage, agreement, settlement and award will override clause 4-A or not. In the present case, I am only concerned with the contract of service. In my opinion the contract of service cannot override the probationary period specified in Clause 4-A. Clause 4-A has been already interpreted by the learned Single Judge of this Court in *Indian Tobacco (supra)* following the decision of the Apex Court in *Western India Match Co. (supra)* and I find no reason to differ from this view. None of the decisions cited by Ms. Patankar deal with the provisions akin to Clause 4-A. Therefore, the finding of the Labour Court that the Respondent had become permanent upon completion of three months" period will have to be upheld.

31. If this view is not taken, it will lead to various anomalous situations. An employer will enter into contracts of service specifying probation periods at will. An employee seeking employment is not at an equal position. The employer will be able to keep a workman on probation perpetually by neither issuing an order of confirmation nor issuing an order of termination and specify any period of probation at will. Such position obviously cannot be countenanced. On the other hand, if the employer is not permitted to override Clause 4-A by contract of service, all that will happen is that after the period of three months the employer will have to either take a decision to discontinue the probation if the employer is not happy with his work, discontinue the services. If the employer feels that the establishment needs longer probationary period he can get it changed by following methodology under Section 5 of the Act. The second course of action will bring certainty in the establishment and will be in consonance with the spirit of the Act. The legislature, by introducing Section 4-A in this manner has made it clear that there must be certainty regarding the period of probation and an

employee must know where he stands after the probationary period is over. The probationary period can be changed by Certified Standing Orders which will be then uniformly applicable.

32. Ms. Patankar then submitted that the Labour Court travelled beyond the period of reference. The terms of Reference are as under :

(1) Whether Mrs. Swati Nowgaonkar, a probationer, employer in the employment of Wika Instruments India Pvt. Ltd., Kesnand, Pune, is a workman within the meaning of Section 2(s) of the Industrial Disputes Act, 1947?

(2) If so, whether she has put in service for more than 240 days in the employment of the said management?

(3) If so, whether her services have been terminated illegally with effect from 18 April 2008 by the said management?

Ms. Patankar submitted that, from the reference, it is seen that the Respondent is a probationer is an admitted position and justification for termination was never referred to in the reference. The submission cannot be accepted. The first term is, whether the Respondent is a workman. The phrase "probationer" is only a description and not an admitted position. Clause 3 deals with legality of the termination which will include the incidental questions. Further more, as it has been pointed out by Mr. Kulkarni, that the termination letter does not give any details as to why the services were not found satisfactory. In the written statement the Petitioner came out with a theory of misbehaviour, insubordination, absenteeism, etc.

33. If the Respondent is terminated from service on the ground of misconduct, an enquiry had to be held. In the case of V. Subramanian v/s Deepak Nitrite Ltd., Bombay & anr. 1997 II CLR 1157, the learned Single Judge (R.M. Lodha, J. as his lordship then was) held that an employee who had become permanent on completion of three months probationary period could not be terminated on the ground of unsatisfactory work, as it will be a punitive termination without holding an enquiry. In the present case also, admittedly, no enquiry has been held. The Petitioner has tried to contend that the work of the Respondent was not only not satisfactory but has attributed various grounds of misconduct. The Labour Court has considered those grounds and has come to the conclusion that the Petitioner has failed to prove the allegations made against the Respondent. Apart from this position, as rightly submitted by Mr. Kulkarni, if the termination casts a stigma, even during the period of probation, an enquiry ought to have been held. The Labour Court has taken a note that no memo, not even a warning was issued to the Respondent. This finding of fact, rejecting the allegations of the Petitioners, cannot be termed as perverse and it is not possible to take another view.

34. Ms. Patankar, then contended that assuming a case is made out in favour of the Respondent, considering the fact that staff of the Petitioner is not happy with the services of the Respondent, compensation can be granted to the Respondent

and it is not necessary to grant reinstatement in service. She relied upon the decision of the learned Single Judge (Lodha, J.) in the case of V. Subramanian (supra), wherein Lodha, J., after holding that termination was bad in law and after completion of probationary period the employee worked for eight months, held that case for compensation was made out.

35. In the case of Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D. Ed.) and Others, , the Apex Court has taken review of the law regulating wrongful termination of service and reinstatements. The Apex Court has held that in cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule. In the case of V. Subramanian (supra), Lodha,J. was considering the exceptional circumstance. Lodha, J. noted the general rule and held that an exceptional circumstance was made out in the facts of that case for grant of compensation. No doubt Lodha,J. had noted that the employee therein had worked only for eight months, but the period of eight months, which is the only similarity in the present case, was not considered by Lodha,J. as the exceptional circumstance. Lodha, J. noted that the employee was a Personal Assistant and stenographer, which was an employment of trust and confidence, and from the allegations there was clear breakdown of trust and confidence. In any case, before Lodha, J. the counsel thereafter settled the matter and closed the litigation on payment of certain agreed sum. The matter, by consent, was disposed of as settled on monetary terms.

36. In the present case, the offer of the Petitioner for monetary settlement was put to the Respondent and the learned counsel for the Respondent, on instructions, submitted that the financial and personal condition of the Respondent is such that she is seriously in need of employment. She is in need of steady source of income than a lump-sum amount. The Respondent has specifically deposed that she is unemployed and she has not been able to find work. There is no cross-examination by the Petitioner as regard this assertion. Nothing therefore is shown that even after finding the termination is illegal, she should not be granted reinstatement and back wages. Nothing is shown that there was breakdown of trust, and the post is of personal confidence.

37. In conclusion, therefore, the finding recorded by the Labour Court that the Respondent had become permanent and her termination was illegal, requires no interference. Since the termination is illegal, the Respondent is entitled to reinstatement. The assertion of the Respondent that she is unemployed has gone unchallenged. Nothing is shown as to why she should be deprived of relief of reinstatement with full back wages. No case is made out to grant only compensation.

38. The writ petition accordingly fails and is dismissed. Rule discharged.